# Rajasingam a/l VS Rasiah v Government of Malaysia

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 21–54 OF 1987
JEFFREY TAN J
28 SEPTEMBER 2001

***Administrative Law*** *— Rights and liabilities of public servants — Termination — Termination of service in public interest — Application to declare termination void — Whether officer had been dismissed — Whether officer had right to be heard*

***Constitutional Law*** *— Public servants — Termination of service 'in the public interest' — Whether amounting to dismissal — Whether officer had right to be heard — Federal Constitution art 135(2)*

***Public Servants*** *— Termination of service — Retirement from public service under s 10(5)(d) of Pensions Act 1980 on ground of public interest — Whether officer had been dismissed — Whether officer had right to be heard — Federal Constitution art 135(2)*

This was the plaintiff's action for a declaration that the defendant's decision requiring the plaintiff to retire from public service under s 10(5)(d) of the Pensions Act 1980 ('the Act') was a nullity and of no effect in law. The plaintiff was a federal officer in the service of the defendant in its Immigration Department since 6 November 1964. In September 1982, the plaintiff was charged at the magistrate's court with the commission of a criminal offence. The charges were however dismissed and the plaintiff was acquitted and discharged without his defence being called. After his acquittal on or about 20 December 1982, the plaintiff resumed full duty with the defendant. By a letter dated 27 July 1984, the plaintiff was informed that his service was terminated under O 44(3) of the Public Officers (Conduct and Discipline) General Orders 1980 ('the General Orders') and he was required by the Yang di Pertuan Agong to retire from the public service under s 10(5)(d) of the Act on the ground of public interest.

**Held,** dismissing the plaintiff's application:

(1) Article 135(2) of the Federal Constitution provided that a public servant shall not be dismissed without being given a reasonable opportunity of being heard but by virtue of proviso (b) therein, the right to be heard was not applicable in the case where the service of the public servant was terminated in the public interest. Such termination did not constitute dismissal, whether or not the decision to terminate was connected with the misconduct or the unsatisfactory performance of duty by the public servant. Further, general order 44(3) of the General Orders provided that the officer 'may not be given any opportunity of being heard' where the officer's services had been terminated in the public interest. It was an agreed fact that in the instant case, the plaintiff's service

was terminated under general order 44(3) of the General Orders and that the plaintiff was required by the Yang di Pertuan Agong to retire from the public service under s 10(5)(d) of the Act on the ground of public interest. As such, the plaintiff could not demand the opportunity of being heard (see pp 13D, 15F, 16D–E); *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 followed.

(2) General order 44 of the General Orders did not offend or circumvent the Federal Constitution. In fact, general order 44 of the General Orders merely echoed proviso (b) to art 135(2) of the Federal Constitution (see p 16F, I).

(3) The proviso to s 10(5)(f) of the Act provided that retirement under s 10(5)(f) shall not be effected unless the officer had been given a reasonable opportunity to make representations thereon to the Yang di Pertuan Agong or the State Authority as the case may be. Here, the plaintiff was retired under s 10(5)(d) and not s 10(5)(f) of the Act. As for s 11 of the Act, the section provided that with the consent of the officer, the Yang di Pertuan Agong or the State Authority as the case may be, may require the officer to retire at any age on the ground of national interest or in the interest of the public service. Similarly, s 11 of the Act was not applicable, as the plaintiff was required by the Yang di Pertuan Agong to retire from the public service under s 10(5)(d) of the Act on the ground of public interest (see p 17B–D).

(4) The plaintiff was a federal officer from 6 November 1964 to 16 August 1984 and his pension granted under s 13 of the Act could not exceed the amount calculated on that actual length of reckonable service. There was never any deduction of the plaintiff's pension as alleged by the plaintiff's counsel. In any event, since the plaintiff was retired under s 10(5)(d) of the Act, he was not entitled to demand for any pension for whatever amount because pursuant to s 13 of the Act, the matter regarding the plaintiff's pension and the amount were in the hand of the Yang di Pertuan Agong (see pp 17H–18A).

(5) Further, based on the decision in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*, it followed that the doctrine of procedural fairness did not require that a public servant be afforded the right to make representations upon the issue of the pension in a case to which proviso (b) of art 135(2) of the Federal Constitution applied (see p 19A).

(6) The court could not interfere with the punishment meted against the plaintiff, in that the court could not substitute the view of the defendant as to what was the appropriate penalty with its own view. In the instant case, the plaintiff had not shown that the termination was not done in compliance with the law in force. The result therefore, was that the termination must stand. Even if the decision of the disciplinary authority, if it had acted arbitrarily

or unfairly or had imposed a punishment that was disproportionate to the misconduct, were liable to be quashed or set aside, there was no material or sufficient material for the court to review the decision (see p 20D, F, H); *Ng Hock Cheng v Pengarah Am Penjara & Ors* [198] 2 MLJ 153 followed.

**[Bahasa Malaysia summary**

Ini adalah tindakan plaintif untuk satu pengisytiharan bahawa keputusan defendan yang menghendaki plaintif bersara daripada perkhidmatan awam di bawah s 10(5)(d) Akta Pencen 1980 ('Akta tersebut') adalah suatu pembatalan dan tidak berkesan di sisi undang-undang. Plaintif adalah seorang pegawai persekutuan di dalam perkhidmatan defendan dalam Jabatan Imigresen sejak 6 November 1964. Dalam bulan September 1982, plaintif telah dipertuduh di mahkamah majistret atas melakukan satu kesalahan jenayah. Pertuduhan-pertuduhan tersebut walau bagaimanapun telah dibatalkan dan plaintif dilepaskan dan dibebaskan tanpa pembelaannya dipanggil. Selepas pembebasan beliau pada atau lebihkurang pada 20 Disember 1982, plaintif telah memulakan semula tugas sepenuhnya dengan defendan. Melalui sepucuk surat bertarikh 27 Julai 1984, plaintif telah dimaklumkan bahawa perkhidmatan beliau telah ditamatkan di bawah A 44(3) Perintah-perintah Am Pegawai-Pegawai Awam (Perlakuan dan Disiplin) 1980 ('Perintah Am tersebut') dan beliau telah dikehendaki oleh Yang di Pertuan Agong untuk bersara daripada perkhidmatan awam di bawah s 10(5)(d) Akta tersebut atas alasan kepentingan awam.

**Diputuskan**, menolak permohonan plaintif:

(1) Perkara 135(2) Perlembagaan Persekutuan ('Perlembagaan tersebut') memperuntukkan bahawa seseorang pegawai perkhidmatan awam tidak akan diberhentikan tanpa diberikan peluang untuk didengar dengan sewajarnya tetapi menurut peruntukan (b) perkara tersebut, hak untuk didengar tidak terpakai dalam kes di mana perkhidmatan sebarang pegawai perkhidmatan awam ditamatkan demi kepentingan awam. Penamatan yang sedemikian tidak membentuk pemecatan, sama ada keputusan untuk memberhentikan dikaitkan dengan salah laku tersebut atau prestasi tugas yang tidak memuaskan oleh pegawai perkhidmatan awam itu atau pun tidak. Selanjutnya, perintah am 44(3) Perintah Am tersebut memperuntukkan bahawa pegawai tersebut 'tidak diberikan sebarang peluang didengar' di mana perkhidmatan pegawai tersebut telah diberhentikan demi kepentingan awam. Adalah fakta yang dipersetujui bahawa dalam kes semasa, perkhidmatan plaintif telah ditamat di bawah perintah am 44(3) Perintah Am tersebut dan bahawa plaintif telah dikehendaki oleh Yang di Pertuan

Agong untuk bersara daripada perkhidmatan awam di bawah s 10(5)(d) Akta tersebut demi kepentingan awam. Oleh yang demikian, plaintif tidak boleh menuntut untuk didengar (lihat ms 13D, 15F, 16D–E); *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 diikut. A

(2) Perintah Am 44 Perintah Am tidak menyalahkan atau memintas Perlembagaan tersebut. Pada hakikatnya, perintah am 44 Perintah Am hanya mengulangi peruntukan (b) kepada perkara 135(2) Perlembagaan tersebut (lihat ms 16F, I). B

(3) Peruntukan kepada s 10(5)(f) Akta tersebut memperuntukan bahawa persaraan di bawah s 10(5)(f) tidak akan dikuatkuasakan melainkan pegawai tersebut telah diberikan peluang yang sempurna untuk membuat representasi ke atasnya kepada Yang di Pertuan Agong atau Pihak Berkuasa Negeri seperti mana keadaannya. Di sini, plaintif telah diberhentikan di bawah s 10(5)(d) dan bukan s 10(5)(f) Akta tersebut. Berhubung s 11 Akta tersebut, seksyen tersebut memperuntukan bahawa dengan kebenaran pegawai tersebut, Yang di Pertuan Agong atau Pihak Berkuasa Negeri seperti mana keadaannya, mungkin akan menghendaki pegawai tersebut untuk bersara pada sebarang umur atas alasan kepentingan negara atau demi kepentingan perkhidmatan awam. Begitu juga, s 11 Akta tersebut tidak boleh dipakai, kerana plaintif telah dikehendaki oleh Yang di Pertuan Agong untuk bersara daripada perkhidmatan awam di bawah s 10(5)(d) Akta tersebut demi kepentingan awam (lihat ms 17B–D). C D E

(4) Plaintif telah menjadi pegawai persekutuan daripada 6 November 1964 hingga 16 Ogos 1984 dan pencen beliau yang diberikan di bawah s 13 Akta tersebut tidak boleh melebihi jumlah yang dikira pada jangka tempoh perkhidmatan yang boleh diambilkira. Tidak pernah terdapat sebarang penolakan akan pencen plaintif seperti mana yang didakwa oleh peguam plaintif. Dalam sebarang keadaan, oleh kerana plaintif telah diberhentikan di bawah s 10(5)(d) Akta tersebut, beliau tidak berhak kepada tuntutan bagi sebarang pencen untuk apa jumlah sekalipun kerana selaras dengan s 13 Akta tersebut, perkara berhubung pencen plaintif dan jumlah tersebut terletak dalam tangan Yang di Pertuan Agong (lihat ms 17H–18A). F G

(5) Selanjutnya, berdasarkan keputusan di dalam *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*, didapati bahawa keadilan doktrin prosedur tidak menghendaki seorang pegawai awam diberi hak untuk membuat representasi atas isu pencen dalam kes kepada di mana peruntukan (b) perkara 135(2) Perlembagaan tersebut dipakai (lihat ms 19A). H

(6) Mahkamah tidak boleh campur tangan dengan hukuman yang dijatuhkan terhadap plaintif, iaitu mahkamah tidak boleh menggantikan pandangan defendan berhubung dengan apakah I

penalti yang wajar dengan pandangannya sendiri. Dalam kes semasa, plaintif telah tidak menunjukkan bahawa penamatan tersebut telah tidak dilakukan dalam pematuhan undang-undang yang berkuatkuasa. Keputusannya adalah dengan itu, bahawa penamatan tersebut semestinya kekal. Walaupun jika keputusan pihak berkuasa disiplin — sekiranya ia telah bertindak secara sewenang-wenangnya atau secara tidak adil atau telah menjatuhkan hukuman yang tidak wajar kepada salah laku tersebut — haruslah dibatalkan atau diketepikan, tidak terdapat bahan atau bahan yang mencukupi untuk mahkamah mengkaji semula keputusan tersebut (lihat ms 20D, F, H); *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 2 MLJ 153 diikut.]

**Notes**

For cases on termination of public servants generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 554–556.

For cases on termination of service 'in the public interest', see 3(1) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1772–1773.

For cases on termination of service, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 1777–1778.

**Cases referred to**

*Hong Leong Equipment v Liew Fook Chan* [1996] 1 MLJ 481 (refd)

*Mahan Singh v Government of Malaysia* [1978] 2 MLJ 133 (refd)

*Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243 (refd)

*Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 MLJ 286 (refd)

*Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 2 MLJ 153 (folld)

*R Rama Chandran v Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (refd)

*Rajikishore v State of UP* AIR 1954 All 343 (refd)

*Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 (folld)

**Legislation referred to**

Federal Constitution arts 5(1), 8(1), 135(2)

Pensions Act 1980 ss 3(2), 9, 10, 10(5)(d), 11, 13

Public Officers (Conduct and Discipline) (Cap D) General Orders 1980 general order 44(1), (2), (3), (4)

*V Sithambaram* (*Kumar & Co*) for the plaintiff.

*Mazni Buang* for the defendant.

**Jeffrey Tan J**: This is the plaintiff's action for a declaration that the decision of the defendant, as contained in the defendant's letter dated

27 July 1984 and requiring the plaintiff to retire from public service under s 10(5)(d) of the Pensions Act 1980 ('the Act'), 'was a nullity and of no effect in law and consequently, that the plaintiff is and was at all material times a pegawai immigresen in the Immigration Department', and for several consequential orders. A

With regard to the conduct of the trial, both parties dispensed with oral evidence and relied instead on the legal submissions of counsel. Both parties also relied on the following agreed facts (see statement of agreed facts marked 'A'): B

1 the plaintiff was since 6 November 1964 and at all material times a federal officer in the service of the defendant in its Immigration Department within the meaning of the Act; C

2 in or about September 1982, the plaintiff was charged at the Magistrate's Court at Penang with the commission of a criminal offence;

3 on or about the 18 November 1982, the said charge was dismissed by the court and the plaintiff was acquitted and discharged without his defence being called. Between September and November 1982, the plaintiff was interdicted on half-pay; D

4 after his acquittal, the plaintiff on or about 20 December 1982 resumed full duty as Pegawai Immigresen in the Immigration Department of the defendant; E

5 on or about 3 September 1983, the defendant was granted a housing loan of RM67,057 to enable him to purchase a house, and relying upon the same, the plaintiff purchased a property, lot 3159, Mukim of Assam Kumbang, Taiping, Perak together with a terrace house erected thereon known as No 31, Jalan Bangau, Kamunting Garden, Taiping; F

6 the full loan was released by the defendant on 1 November 1983, and the plaintiff commenced repayment of the said loan on 30 November 1983 when the defendant deducted the monthly instalment in his salary of RM60 per month;

7 on 1 January 1984, the defendant permitted the plaintiff to cross his efficiency bar and was paid an increment in his salary of RM60 per month; G

8 by a letter dated 27 July 1984, the plaintiff was informed that his service was terminated under general order 44(3) Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) 1980, and he was required by the Yang di Pertuan Agong to retire from the public service under s 10(5)(d) of the Act on the grounds of public interest with effect from the 16 August 1984 at which date the plaintiff was 42 years and 11 months old. No reasons were given for the said decision; H

9 by a subsequent letter, the plaintiff was informed that in the exercise of his discretion under s 13 of the Act, the Yang di Pertuan Agong was withholding pension from him to the extent of 30%. No reasons were given for the said decision; I

10 by letter dated 5 August 1987, the plaintiff's solicitors, Messrs Kumar & Co wrote to the defendant requesting a review of the decision to retire the plaintiff from the public service with a view to reinstating him in his post as pegawai immigresen and payment of his salary and all other employment benefits as from 16 August 1984, but to date the plaintiff has not received a reply;

11 the plaintiff was not afforded any opportunity to state his case before the said decision was made to retire him from the public service.

To begin with, Mr V Sithambaram for the plaintiff orally submitted that the general question is 'can Duli Yang Maha Mulia terminate or retire a public servant under the Federal Constitution ('the Constitution') and under the General Orders without assigning any reason, ground, charge or allegation whatsoever?'. According to Mr Sithambaram, the next two questions are 'has the court the power to review or conduct a judicial review of the decision made by Duli Yang Maha Mulia?' and 'if Duli Yang Maha Mulia had the unlimited power to terminate or retire a public servant, can Duli Yang Maha Mulia arbitrarily reduce the entitled pension?'. On the right to be heard, Mr Sithambaram orally submitted that art 135(2) of the Constitution provides that a public servant shall not be dismissed without being given a reasonable opportunity of being heard. The rest of Mr Sithambaram's oral submission may be summarized as follows. The provisos to art 135(2) have been incorporated to general order 44 of the Public Officers (Conduct and Discipline) (Cap D) General Order 1980. Whereas art 135(2) gives a right to be heard, the said provisos takes away that right. General order 44 offends the Federal Constitution. A right was violated. The court has the powers to review. Section 10 of the Act confers a right to be heard. Section 11 of the Act provides that retirement must be with the consent of the public servant. Section 13 of the Act empowers DYMM to grant but not to reduce the pension. 'There was bad faith, because no reasons were given for the termination.' 'A public servant can only be terminated in compliance with the law. The law gives the plaintiff a right to be heard, and to be given a reason for his dismissal, if not, the court could assume that there was no proper reason.' Except for the provisos, the instant case is similar to *Mahan Singh v Government of Malaysia* [1978] 2 MLJ 133. 'It is for the court to interpret the provisos to art 135(2) of the Constitution and the effect on *Mahan Singh*'s case.' General order 44(1) and (2) require the head of department to submit a report to the government. 'Here, we don't have such a report.'

In his written submission, Mr Sithambaram restated that the decision of the defendant is open to challenge, as it is harsh and unjust, having regard to the circumstances of the case, that the plaintiff had a vested right to be heard, and that there was a failure to observe fair procedure. Citing *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243 at pp 245–246, *Hong Leong Equipment v Liew Fook Chan* [1996] 1 MLJ 481, and *R Rama Chandran v Industrial Court of Malaysia and Anor* [1997] 1 MLJ 145 at p 195, Mr Sithambaram contended that the court has ample powers to review the decision as contained in the letter dated 27 July 1984. 'General

order 44(4) was added to circumvent art 135(2) of the Constitution.' Both provisos to art 135(2) do not say that an officer terminated in the public interest need not be given a reasonable opportunity of being heard. Both arts 5(1) and 8(1) of the Constitution provide for procedural fairness. The plaintiff was not given any reasons for the decision. 'It is not known what the plaintiff had done or what public interest was served by terminating him under O 44(3).' 'The decision to terminate was arbitrary. [The plaintiff] had a right to continue in his employment subject to removal for misconduct. [The plaintiff] had been deprived of his livelihood without the observance of a fair procedure in the decision to remove him. That was done in breach of the fundamental rights guaranteed by the Constitution in arts 5(1) and 8(1) thereof. The decision to terminate him directly affected his right to livelihood which is a fundamental right encompassed in art 5(1), or the inevitable effect of the decision or its consequence on the fundamental right is such as to make its exercise ineffective or illusory.' The plaintiff was not paid his full pension; 30% was deducted and no reasons were given. Section 13 of the Act provides for 'a pension based on the actual length of reasonable service'. 'Section 3(2) of the Act provides that where DYMM is satisfied that the officer has been guilty of negligence, irregularity or misconduct, DYMM may reduce or withhold the pension.' The plaintiff was doubly wronged by having his pension reduced.

In her written submission, Ms Mazni Buang for the defendant contended as follows. Pursuant to general order 44(3), the plaintiff was terminated from service on the ground of public interest. Pursuant to s 10(5)(d) of the Act, the Yang di Pertuan Agong required the plaintiff to be retired from public service on the ground of public interest. The plaintiff was not dismissed from public service. 'Oleh itu plaintif tidak perlu diberi peluang untuk didengar.' Proviso (b) of art 135(2) of the Constitution provides that termination in the public interest is not dismissal. The reasonable inference to be drawn from proviso (b) of art 135(2) of the Constitution is that there is no right to be heard in the case of termination in the public interest. Any right to be heard was lost to the plaintiff by reason of the operation of proviso (b) of art 135(2) of the Constitution. On the ratio decidendi of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at 298, the plaintiff need not be heard. Proviso (b) of art 135(2) of the Constitution was inserted to expressly exclude the right to be heard in a case of termination in the public interest. Articles 5(1) and 8(1) of the Constitution are not applicable in the instant case, as there is a specific provision — art 135(2) of the Constitution. On the authority of *Rajkishore v State of UP* AIR 1954 ALL 343, it is clear that art 135(2), and not arts 5 or 8, is the applicable article. A pension is a privilege and not a right. The giving of a pension depends on eligibility. The disciplinary board had complied with general order 44 and s 10(5)(d) of the Act. Both provisions must be read together and not in isolation. Proviso (b) of art 135(2) came about because of *Mahan Singh's* case. The plaintiff's case falls within proviso (b) of art 135(2) of the Constitution. Not all persons are entitled to a pension. Only those under s 9 of the Act are entitled to receive pension. The plaintiff fell within s 9(1) of the Act. The plaintiff was entitled

to a pension as he was terminated pursuant to s 10(5)(d) of the Act. First, the plaintiff must be terminated pursuant to O 44. Only after then could the plaintiff be retired pursuant to s 10(5)(d) of the Act. If the plaintiff was not priorly terminated, the plaintiff could not be retired pursuant to s 10(5)(d) of the Act. The correct procedure was followed. Based on *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at p 298, the plaintiff had no second right of hearing upon the issues of retirement in the public interest and of the reduction of the pension. The termination, even if it involved an element of punishment — the reduction of the pension — was within proviso (b) of art 135(2) of the Constitution. There was no procedural irregularity. Based on *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 2 MLJ 153, the decision as contained in the letter dated 27 July 1984 could not be questioned nor substituted. The legal authorities submitted by the plaintiff do not concern the case of termination in public interest and/or art 135(2) of the Constitution, and should be ignored. In her short oral submission, Ms Mazni further submitted that O 44(1) and (2) had not been raised in the pleadings and so should not be considered, and that it is not an agreed fact that the report of the head of department was not submitted.

So much for the legal submissions of counsel. But more importantly, what has the law to say?

Article 135(2) of the Constitution provides 'that no member [of any of the services mentioned in paras (b) to (h) of cl 1 of art 132] shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard'. But there are two provisos; art 135(2) 'shall not apply' in a case to which proviso (a) or proviso (b) operates.

And proviso (b) of art 135(2) p of the Constitution provides as follows:

> Provided further that for the purpose of this article, where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di Pertuan Agong under cl (2) of art 132, such termination of service shall not constitute dismissal whether or not the decision to terminate the service is connected with the misconduct of or unsatisfactory performance of duty of such member in relation to his office or the consequences of the termination involved an element of punishment; and this proviso shall be deemed to have been an integral part of this article as from Merdeka Day.

It is an agreed fact (agreed fact 8) 'that by a letter dated 27 July 1984, the plaintiff was informed that his service was terminated under [O 44(3) of the Public Officers (Conduct and Discipline) General O 1980] and [that the plaintiff] was required by the Yang di Pertuan Agong to retire from the public service under s 10(5)(d) of the Act on the ground of public interest with effect from 16 August 1984 ...'.

General order 44(3) provides as follows:

> (3) It shall be lawful for the Appropriate Disciplinary Authority to recommend to the Government that an officer should be required to retire from the public service in the public interest notwithstanding that any disciplinary proceeding has or has not been carried out under any of

> the provision of these General Orders and the Government may or may so terminate the service of the said officer. For the purpose of clearing any doubt, the provision of para (4) of this General Order shall apply in respect of termination of service of such public officer under this paragraph.

And para (4) of general order 4 further provides as follows:

> (4) Notwithstanding anything in these General Orders and any other law to the contrary, in terminating the service of any officer in the public in the public interest under this General Order, such officer may not be given any opportunity of being heard and such an officer whose service has been terminated in the public interest shall not, for the purpose of art 135(2) of the Federal Constitution be regarded as having been dismissed regardless of whether such termination of the service of the officer involved an element of punishment and/or connected, either wholly or partly, with his conduct in relation to his office which the Government regards as unsatisfactory or blame-worthy.

Quite plainly therefore, under the aforesaid general orders upon which the service of the plaintiff was terminated, the plaintiff 'may not be given any opportunity of being heard'. Under the aforesaid general orders, the plaintiff may or may not be given an opportunity of being heard. The plaintiff could not demand the opportunity of being heard. Indeed, proviso (b) of art 135(2) of the Constitution clearly provides that art 135(2) shall not apply 'where the service of a member of such a service is terminated in the public interest under any law for the time being in force or under any regulation made by the Yang di Pertuan Agong under cl (2) of art 132'. Given that it is an agreed fact that the service of the plaintiff was terminated in the public interest under the said General Orders, meaning therefore that the service of the plaintiff was terminated in the public interest under existing law, proviso (b) of art 135(2) of the Constitution clearly operated. It was futile to contend that the plaintiff was not given the reasonable opportunity of being heard, when proviso (b) of art 135(2) clearly provides that art 135(2) 'shall not apply'.

It was contended, that art 135(2) gives a right to be heard, and that general order 44 offends and or circumvents the Constitution. With respect, art 135(2) of the Constitution shall only apply in the case of a dismissal or a reduction in rank of a member of any of the services mentioned in paras (b) to (h) of cl 1 of art 132 of the Constitution. But as provided in the second proviso to art 135(2), any termination of services in the public interest under any law for the time being in force or under any regulation made by the Yang di Pertuan Agong under cl (2) of art 132 'shall not constitute dismissal'. Accordingly, there was no dismissal in the present case. The second proviso to art 135(2) of the Constitution operated in the present case. Consequently, there was no right of a reasonable opportunity of being heard. That general order 44 takes away the right to he heard given in art 135(2) is just simply not true. General order 44 merely echoes the provisos of art 135(2) of the Constitution. The fact of the matter is that the right of a reasonable opportunity of being heard in the case of dismissal or reduction in rank cannot be taken away by the provisos to art 135(2) or by

general order 44 for the simple reason that the provisos of art 135(2) and general order 44, in the case of dismissal or reduction in rank, will not operate.

Mr Sithambaram argued that s 10 of the Act confers a right to be heard, that s 11 of the Act provides that retirement must be with the consent of the public servant, and that s 13 of the Act empowers the Yang di Pertuan Agong to grant but not to reduce the pension. With respect, s 10 does not confer any right to be heard. The proviso to s 10(5)(f) merely provides 'that retirement under this paragraph [meaning s 10(5)(f)] shall not be effected unless the officer has been given a reasonable opportunity to make representations thereon to the Yang di Pertuan Agong or the state authority, as the case may be'. And the proviso to s 10(5)(f) did not operate, as the plaintiff was retired, not under s 10(5)(f) but under s 10(5)(d). At any rate, para (f) of sub-s (5) shall apply only to officers appointed to the public service after the commencement of [sub-s (6) of s 10] s 10(6) of the Act, but the plaintiff who was a federal officer in the Immigration Department since 6 November 1964 (agreed fact 1) was not an officer appointed to the public service after the commencement of s 10(6) of the Act (s 10(6) commenced on 11 April 1991). On the matter of s 11, the latter section provides that with the consent of the officer, (a) the Yang di Pertuan Agong may require a federal officer to retire at any age (i) on the ground of national interest; or (ii) in the interest of the public service; and (b) the state authority may require a state officer to retire at any age (i) with the approval of the Yang di Pertuan Agong, on grounds of national interest; or (ii) in the interest of the public service. However, since 'the plaintiff was required by the Yang di Pertuan Agong to retire from the public service under s 10(5)(d) of the Act on the ground of public interest ...' (agreed fact 8) and not on the ground of the interest of the public service, s 11 obviously did not operate. One other statutory provision that was also totally misconstrued was s 13, which reads as follows:

> The Yang di Pertuan Agong may, if he thinks it fit, grant a pension, gratuity or other benefit to an officer who is retired under s 10(5) (d) or s 10(5) (f), but the amount shall not exceed that for which such officer would be eligible had his pension, gratuity or other benefit been calculated based on his actual length of reckonable service.

In other words, s 13 provides that the pension, gratuity or other benefit to an officer retired under s 10(5)(d) or 10(5)(f), only if the Yang di Pertuan Agong so thinks it fit to grant, shall not exceed the amount for which such officer would be eligible had his pension, gratuity or other benefit been calculated based on his actual length of reckonable service.' The plaintiff was a federal officer from 6 November 1964 (agreed fact 1) to 16 August 1984; his pension granted under s 13 could not exceed the amount calculated on that actual length of reckonable service. It is so evident, that the pension was 'withheld' to the extent of 30% (agreed fact 9) by reason of the actual length of reckonable service. There was never any deduction of any pension. In any event, the plaintiff, because he was retired under s 10(5)(d), would not demand any pension for whatever amount. For pursuant to s 13, the matter of the pension to the plaintiff and the amount

(subject that it shall not exceed the amount calculated based on his actual length of reckonable service) were all in the hands of the Yang di Pertuan Agong.

Both sides cited *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* to support their case. And indeed *Tan Tek Seng* provides answers. The facts in *Tan Tek Seng* were as follows. The appellant, a senior assistant of a primary school, was entrusted by the Johor Education Department with a sum of RM3,179 which constituted the unpaid salary of the school's gardener who had not turn up for work for several months. When the department asked for the return of the money, the appellant told them that it had been sent to them. In fact, he had kept it with him. Eventually he sent the money. The appellant was then charged with two counts of criminal breach of trust by a public servant under s 409 of the Penal Code. The sessions court convicted the appellant and sentenced him to six months imprisonment. On appeal, the Muar High Court affirmed the finding of guilt. However, the High Court made an order which had the effect of setting aside the conviction and punishment; it bound the appellant over to be of good behaviour for a period of three years in the sum of RM5,000 without sureties. Thereafter, the department wrote to the first respondent, recommending that the appellant be reduced in rank and salary to those of an ordinary teacher. The first respondent decided however to dismiss the appellant under General order 33 and 35(1). Dissatisfied, the appellant instituted proceedings at the Johor Bahru High Court, seeking a declaration that his dismissal was null and void on the grounds, inter alia, (i) that the first respondent was in breach of natural justice for not affording the appellant a reasonable opportunity of being heard pursuant to art 135(2), and (ii) that the decision of the first respondent was harsh and unfair. The respondents argued that the appellant, under proviso (a) of art 135(2), was not entitled to a hearing, as he was a person who was dismissed on the ground of conduct in respect of which a criminal charge has been proved against him. The Johor Bahru High Court upheld the dismissal. On appeal, the Court of Appeal unanimously held that art 135(2) did not apply to the case. Gopal Sri Ram JCA held that 'that right [of a reasonable opportunity of being heard] is lost to the servant by the operation of para (a) of the proviso to art 135(2)' (see p 298), whilst NH Chan JCA held that 'art 135(2) will not apply to a case which comes within any proviso to the article' (see p 305). It must add up that the right of a reasonable opportunity of being heard is similarly lost to the servant by the operation of proviso (b) of art 135(2) of the Constitution. Therefore, the plaintiff's claim that his termination had infringed art 135(2) of the Constitution, in that he was not afforded a reasonable opportunity of being heard, must necessarily fail.

Where their Lordships (Gopal Sri Ram JCA, and NH Chan JCA) differed was on the matter of the 'punishment'. It was the majority judgment that the disciplinary authority, when deciding what punishment it ought to impose on a particular public servant, must 'act reasonably and fairly', and that the decision of the disciplinary authority, if it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, is liable to be quashed or set aside. Nevertheless, when in

A delivering the majority judgment, Gopal Sri Ram JCA appended, 'that the doctrine of procedural fairness, which is a product of the combined effect of arts 8(1) and 5(1) of the Constitution, does not require that a public servant be afforded the right to make representations upon the issue of punishment in a case to which proviso (a) of art 135(2) applies' (see p 298), that 'there is no second right of hearing upon the issue of punishment in cases falling within proviso (a) to art 135(2)' (see p 299), and that 'since there is a specific provision, namely art 135(2) of the Constitution, that houses the doctrine of fairness in particular cases, it would, in all those cases, save for very limited purposes, be unnecessary to have resort to the wider and general application of art 5(1) and 8(1).' Then doubtedly, it must follow that the doctrine of procedural fairness does not require that a public servant be afforded the right to make representations upon the issue of the pension in a case to which proviso (b) of art 135(2) of the Constitution applies. And that it was the majority judgment, as indeed it was the judgment in *Rajkishore v State of UP* AIR 1954 All 343, that the maxim *generalia specialibus non drogant*, that is, 'special provisions will control general provisions', applies.

The minority judgment is also not helpful to the plaintiff; NH Chan JCA held that proviso (a) of art 135(2) should have been sufficient to dispose of the appeal, and that the court (whether it be the High Court, Court of Appeal or the Industrial Court) must not substitute its own views as to what the appropriate penalty (for the employee's misconduct) was for the view of the particular employer concerned.

And that minority judgment in *Tan Tek Seng* has the support of the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara & Ors* [1998] 1 MLJ 153, where the only question of law was whether 'the appellant had been dismissed from public service validly and whether a court had power to interfere with any punishment meted out by the disciplinary board' (see p 156). With regard to the second part of the question of law as to whether the court could interfere with the nature of the punishment meted out by the disciplinary board, the Federal Court, per Peh Swee Chin FJ had this to say, at pp 158–159:

> A public servant is entitled to impugn any allegation or accusation of any disciplinary breach against him by way of judicial review on the protection given by art 135 of the Federal Constitution which provides that no member of such service shall be dismissed or reduced in rank except: (a) only by an authority that appointed him in the first place; and (b) after being given a reasonable opportunity of being heard. He is, in addition, entitled to protection from sufficient compliance with the rules of natural justice and the disciplinary procedure therefore: see *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan & Anor* [1997] 2 MLJ 361. If the public officer succeeds in so impugning, any order of punishment, including an order of dismissal, can be declared invalid or void, and such order being so declared void, is deemed not to have been made at all or is deemed to have been only purportedly made previously. But if the public officer fails to so impugn, any order of punishment remains and there should be no further review on such order of punishment.

> To so further review judicially would be acting against the concept, in the case of an order of dismissal, that there should not generally be any employment against the will of employer or employee. After all is said and done, persons in the pubic service categorized under art 132 of the Federal Constitution are in fact employees
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> ... It must be borne in mind that when a court declares as void an order of dismissal against a public officer categorized under art 132 of the Federal Constitution (see Mohd bin Ahmad), it does so because the accusation against him on which such an order of dismissal is based, has been found to be invalidly made or conducted, so that the order of dismissal, and for that matter, any other order of penalty is thereby a non sequitur. The court in truth is not substituting the order of dismissal with its own measure of punishment and if in the latter case, it would amount to the court forcing the employer/ government to still employ him, or specifically enforcing a contract of personal service.

Then in the following paragraph, specifically commenting on the majority judgment in *Tan Tek Seng*, Peh Swee Chin FJ pronounced:

> Thus, we are of the opinion that on the narrow point in question, the majority judgment in *Tan Tek Seng* cannot stand though we express our agreement with the minority judgment on the same narrow point.

It could not be any more explicit that the court cannot interfere with the punishment, in that the court (whether it be the High Court, Court of Appeal or the Industrial Court) cannot substitute its own views as to what the appropriate penalty was for the view of the particular employer concerned (see also *Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 MLJ 286, where Kamalanathan Ratnam J followed *Ng Hock Cheng*, and held, and this court agrees, that a decision made in respect of a matter relating to the Industrial Court is confined only to matters relating to the Industrial Court).

In the instant case, the plaintiff has not shown that the termination was done not in compliance with the law in force. And so the result — the termination — must stand. Anyway, whenever a public servant is required to retire, the issue of reduction in rank cannot arise. Termination is the only result. There could be no other result. The remaining consideration is the pension. And here, the plaintiff was granted his pension, albeit calculated based on his actual length of reckonable service; s 13 would not permit any more. To summarize, the plaintiff was required by the Yang di Pertuan Agong to retire, and termination was the only result. And the plaintiff was given a pension that was in the absolute discretion of the authority to give. There was no error.

And lastly, even if the decision of the disciplinary authority, if it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, is liable to be quashed or set aside, there is no material or sufficient material for the court to review the instant decision made under reg 44(3). Unlike *Tan Tek Seng*, where the Court of Appeal held that the disciplinary authority ought to have considered the several factors set out by the Muar High Court and the recommendation made by the Department to the Education Service Commission (see p 300). Here however, the

agreed facts do not set out the relevant factors in the decision. There is no way for the court to even begin to review, even if it could, the decision of the authority.

For all the reasons aforesaid, the plaintiff's claim is dismissed with costs.

*Plaintiff's application dismissed.*

Reported by Lim Lee Na